SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 23

HAROLD L. ICKES, AS SECRETARY OF THE INTERIOR, PETITIONER

vs.

VIRGINIA-COLORADO DEVELOPMENT CORPORATION

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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[Caption omitted.]

1 In Supreme Court of the District of Columbia

Holding an Equity Court

No. 55221, In Equity

VIRGINIA-COLORADO DEVELOPMENT CORPORATION, PLAINTIFF

v.

RAY LYMAN WILBUR, AS SECRETARY OF THE INTERIOR, DEFENDANT

Bill for mandatory injunction

Filed Jan. 9, 1933

Plaintiff respectfully shows to the court:

1. Plaintiff is a corporation organized under the laws of the State of Virginia, having its home office in the city of Winchester, in said State, and brings this suit in its own right.

2. The defendant is a citizen of the United States, temporarily residing in the District of Columbia, and is sued in his official capacity as Secretary of the Interior.

3. In the month of June 1917, plaintiff, under, pursuant to, and in compliance with an act of Congress approved May 10, 1872, afterwards section 2324 of the Revised Statutes of the United States and now embodied in section 28, title 30, U.S.C.A., located and duly perfected the location of certain oil shale placer claims situated on mineral lands of the United States in the State of Colorado, said claims being known and described as the Mt. Mamm no. 12, N½N½ sec. 1, no. 13, S½N½ sec. 1, no. 14, N½S½ sec. 1, involving no. 15, S½S½ sec. 1, no. 16, N½N½ sec. 12 and no. 17, S½N½ sec. 12, all in T. 8 S., R. 94 W., 6th P.M., oil shale placers, and thereupon the plaintiff became and was the owner of said claims and was vested with the right to the exclusive possession of the same.

4. In and by said section 2324 of the said Revised Statutes of the United States, it is provided that:

"* * * On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than
2 $100 worth of labor shall be performed or improvements made during each year. * * * and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

Plaintiff avers that there was not less than $100 worth of labor per-

formed or improvements made during each year on each of said claims during the period from the time of location thereof, as aforesaid, to and including the year ending July 1, 1930; but that during the year ending July 1, 1931; plaintiff did not perform labor or make improvements of the value of $100 on each of said claims, or any of them, and that it had not resumed work upon said claims, or any of them prior to and including September 4, 1931. and has not since actually resumed work thereon. That on and prior to September 4, 1931, plaintiff intended to resume work on said claims and on said September 4, 1931, plaintiff had made arrangements for the resumption of said work, and would have resumed the same had it not been for the unwarranted action of defendant as hereinafter shown. Plaintiff has never at any time abandoned said claims or any of them or had any intention of abandoning any of said claims; and no charge, allegation, or claim was made in the charge or challenge to plaintiff's title to said claims as hereinafter set forth, or in the said proceedings thereon or thereafter, that plaintiff had abandoned said claims or any of them.

5. On or about the 4th day of September 1931, certain adverse proceedings were initiated by the Department of the Interior, through the General Land Office, against said claims owned and possessed by the plaintiff, as aforesaid, by filing in the General Land Office, certain charge or challenge to the plaintiff's title to and right of plaintiff to the possession of said claims and by posting said challenge on the said claims. Said challenge was based on the sole ground that plaintiff had not performed labor or made improvements on said claims of the value of $100 for each claim, as provided in section 2324 of the Revised Statutes as aforesaid for the year ending July 1, 1931, that is, the plaintiff had not performed, as it is commonly called, "annual assessment work" on said claims for the year ending July 1, 1931, and had not resumed such assessment work prior to September 4, 1931. Said challenge also contained the statement that the United States resumed possession of said land. In said challenge no charge was made that plaintiff's title to, or right of exclusive possession of, its said claims was, or ever had been, invalid, the only charge as above stated being that by its failure to perform the said annual assessment work on said claims during the year ending July 1, 1931, and its failure to resume such work before the institution of said adverse proceedings, the plaintiff had forfeited its said title to and right of exclusive possession of said claims, and that, therefore, said claims were the subject of cancellation.

6. Plaintiff avers that there has been no relocation of said claims, or any of them, by any person or persons since the failure of plaintiff to perform the said so-called annual assessment work
3 on said claims or at any other time or times, nor has any application ever been made by any person or persons to lease said claims or any of them from the United States.

7. The charge or challenge hereinabove mentioned made against said claims by the said Interior Department, as aforesaid, was duly served upon the plaintiff, and plaintiff filed its answer to the same, in which it admitted that it had failed to perform said so-called annual assessment work for the period above mentioned, and alleged, among other things, that the United States could not obtain any valid claim or right to said claims by reason of the failure of the plaintiff to perform said so-called annual assessment work; that such failure did not affect the rights of the plaintiff to said claims in the land covered thereby and that the United States could not deprive the plaintiff of said claims or any of the rights of the plaintiff therein under the mining laws of the United States; and that no contest suit or legal action of any kind had been instituted questioning the ownership of the claims by the plaintiff under the laws under which said claims were initiated. Finally, it was alleged by the plaintiff that notwithstanding the failure to perform said assessment work for the period mentioned plaintiff had the right to retain possession of said claims with all the rights incident thereto under the laws under which said claims were initiated and to resume the performance of annual assessment work thereon at any time prior to a valid subsequent location of said claims and that the United States could not take advantage or secure any right in said land on which said claims were located or declare a forfeiture of plaintiff's rights by reason of said failure to perform said annual assessment work.

8. Proceedings were thereafter had before the Commissioner of the General Land Office, who held that plaintiff's said Mt. Mamm claims, hereinabove described, were null and void, and on appeal to the defendant, the Secretary of the Interior, the decision of the Commissioner of the General Land Office was affirmed by said defendant, the Secretary of the Interior, and thereupon the decision of the Department of the Interior, which was dated July 15, 1932, was promulgated, declaring that the said Mt. Mamm oil shale placer claims were null and void and that the United States had taken possession of the lands within said claims for its own uses and purposes; and plaintiff further says that said decision was in effect a decision that the said claims of the plaintiff were forfeited to the United States.

9. Throughout said proceedings, and particularly before the defendant, the Secretary of the Interior, the plaintiff contended that its title to said claims and its right of exclusive possession thereof under the laws of the United States could not be questioned by the United States or declared null and void, or forfeited to the United States by reason of failure to perform labor or make improvements on said claims to the value of not less than $100 annually on each claim, but that its said title to and right of exclusive possession of said claims be lost only by relocation thereof by some other person or persons before said so-called annual assessment work thereon should be resumed by the plaintiff; and that therefore there was no justiciable controversy to be adjudicated by the Department of the Interior,

and that said Department and the defendant, the Secretary
4 of the Interior, was without jurisdiction to hear and determine the matter and that the act of the Department and the defendant, in declaring said claims null and void was without any authority of law whatever. And plaintiff also contended before the defendant, the Secretary of the Interior, that the said proceedings hereinabove described, and the action of the Commissioner of the General Land Office in attempting to declare plaintiff's said claims null and void upon the ground of failure to perform said annual assessment work thereon, as hereinabove set forth, deprived the plaintiff of its property in said claims without due process of law, and were, therefore, void.

10. By section 1 of an act of Congress approved February 25, 1920, it is provided that:

"Deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the act known as the Appalachian Forest Act, approved March 1, 1911 (Thirty-sixth Statutes, page 961), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this act."

And by said act the Secretary of the Interior is authorized to execute leases of the minerals and lands containing minerals described in the portion of said act hereinabove just quoted. Said act, by section 37 thereof, also provides that:

"The deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits in Lander, Wyoming, coal entries numbered 18 to 49, inclusive, shall be subject to disposition only in the form and manner provided" in the act, except as to valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery."

Plaintiff avers that its said claims were valid claims existent on February 25, 1920, which fact was admitted in said proceedings had before the Commissioner of the General Land Office and the Secretary of the Interior and has never otherwise been challenged or denied by the defendant, and plaintiff avers that said claims were, after the date of said act of February 25, 1920, commonly known as the leasing act, maintained in compliance with the laws under which they were initiated.

11. Plaintiff further avers that under the laws of the United States, and particularly by virtue of the laws hereinabove quoted from and referred to, its title to, and right to exclusive possession of, said Mt. Mamm claims hereinabove described, could not be questioned by, or lost or forfeited to, the United States by reason of any failure on the part of the plaintiff to perform on said claims the so-called annual assessment work, as above described; but that

said title and rights of the plaintiff in and to said claims could only be lost, if it failed to perform said annual assessment work on said claims, by the bona fide relocation of said claims by some person or persons before a resumption of such annual assessment work on said claims by the plaintiff; and that after such failure to perform said annual assessment work, the plaintiff had the right to resume the performance of such work at any time unless before such resumption some third party made a bona fide relocation of said claims, which said relocation, as hereinabove stated, has never been made or attempted. And plaintiff further says that the performance of said annular assessment work on said claims was not and is not necessary to preserve the rights of the plaintiff in and to said claims with all the incidents of ownership thereof as against the United States, and that so far as the United was and is concerned, a failure on the part of the plaintiff to perform said annual assessment work on said claims was and is without any effect whatsoever.

12. Plaintiff further avers that the Commissioner of the General Land Office and the Secretary of the Interior, in filing the aforesaid challenge to the title and right of the plaintiff in and to said claims on the sole ground of its failure to perform said annual assessment work thereon for the year ending July 1, 1931, and in not resuming such assessment work before September 4, 1931, and in declaring said claims null and void, were acting without jurisdiction in the premises in that under and according to the applicable laws of the United States the only effect of failure to perform the said statutory annual assessment work, so-called, on said claims, as hereinabove set forth, was to make said claims open for relocation; and in the absence of abandonment of said claims by the plaintiff which, as aforesaid, neither occurred nor was charged or claimed to have occurred by the defendants, plaintiff's right to resume such work on said claims until such relocation, remained unimpaired and unaffected and no authority was vested or existed in the defendants to disturb, interfere with, or declare void or forfeited such right, or the rights of the plaintiff in and to the said claims.

13. Plaintiff avers that even if the defendant, the Secretary of the Interior, did have jurisdiction to take the aforesaid proceedings above described and hear and determine the same, as hereinabove set forth, the said action of said defendant in so taking such proceedings and in deciding the same and in declaring the said claims of the plaintiff null and void as aforesaid, was arbitrary, capricious, and wholly unwarranted and unauthorized by law; and that said action of the defendant deprived the plaintiff without due process of law of its property right vested in the plaintiff to resume such delinquent assessment work without penalty for such delinquency until such rights should be foreclosed by a relocation of said claims by another person or persons. And further, that the said hereinabove unwarranted, arbitrary, and unauthorized claims of the defendant as afore-

said has placed a cloud upon the plaintiff's title to and its right of exclusive possession of the said described Mt. Mamm claims, and upon its right to assume said annual assessment work thereon, which said rights had vested in plaintiff and were indefeasible except by relocation by some person or persons after failure to perform said assessment work and before resumption of such work by plaintiff as aforesaid, which cloud should be removed by decree of this honorable court.

6 14. Plaintiff avers that by reason of the aforesaid arbitrary, capricious, and unlawful action of said defendant the plaintiff has been since, to wit, the 4th day of September 1931, and still is, prevented from resuming and unable to resume performance of the said annual assessment work on said Mt. Mamm claims, and has, as aforesaid, been unlawfully deprived of its right to so perform such work, but that it is now ready, willing, and anxious to resume performance of such work, and if its right so to do is restored to it by decree of this honorable court it will resume the performance of such work.

15. Plaintiff avers that unless the arbitrary, capricious, and unlawful acts of the defendant, the Secretary of the Interior, hereinabove fully described and set forth, be vacated and set aside, plaintiff's title to, and right of exclusive possession in and of, said hereinabove described Mt. Mamm claims will be clouded, and may be lost to it forever, and that it will thereby suffer irreparable damage and injury, and that the plaintiff has no adequate remedy at law.

Wherefore, the premises considered, plaintiff prays:

1. That due process issue out of this honorable court directed to the defendant, as Secretary of the Interior, to appear and answer the exigencies of this bill.

2. That this court will pass a decree requiring the defendant by mandatory injunction to vacate and set aside the proceedings hereinabove described in this bill instituted by the said defendant against the said Mt. Mamm claims, and whereby and by reason of which the said Mt. Mamm claims were declared by the defendant Secretary of the Interior null and void; and to vacate and set aside the decision of the defendant, the Secretary of the Interior, dated July 15, 1932, and each and every order issued thereunder, and the promulgation of said decision, declaring the said Mt. Mamm claims null and void.

3. For such other and further relief as to the court may seem meet and proper.

VIRGINIA-COLORADO DEVELOPMENT CORP.,
By LOUIS TITUS, *Attorney.*

LOUIS TITUS,
CHAS. L. FRAILEY,
Attorneys for Plaintiff.

[*Duly sworn to by Louis Titus, jurat omitted in printing.*]

7 In Supreme Court of District of Columbia

Motion to dismiss

Filed Jan. 14, 1933

The defendant moves to dismiss the bill of complaint on the following grounds:

1. The bill is bad in substance in that it fails to state a case entitling plaintiff to the relief sought, or to any relief in equity.

2. The allegations of the bill disclose that the plaintiff has failed and neglected to comply with provisions of law whereby it might have maintained and protected the described placer mining locations which it theretofore possessed, and that during the period of such failure and neglect the Secretary of the Interior, within the intent, purpose, and scope of the lay in such cases made and provided, canceled, discontinued, and forfeited all such possessory mining rights to the United States through due and sufficient process of law.

3. The bill shows on its face that the action of the Secretary of the Interior of which complaint is made was not arbitrary or capricious but was taken after and pursuant to "hearings in the Department in which relator was represented by able and enthusiastic counsel, and further consideration was given the somewhat difficult and complicated question involved." (Henderson v. Lane, 45 L.D. 649.)

4. The United States, which has not in this behalf consented to be sued, is an indispensable party in whose absence the suit cannot proceed.

E. C. FINNEY,
O. H. GRAVES,
Attorneys for Defendant.

In Supreme Court of District of Columbia

Order denying motion to dismiss the bill of complaint and decree for mandatory injunction

Filed March 10, 1933

Upon consideration of the motion of the defendant in the above-entitled cause to dismiss the bill of complaint herein, it is this 10th day of March 1933,

Adjudged, ordered, and decreed that said motion be, and the same hereby is, overruled and denied.

Whereupon the said defendant, Harold L. Ickes, now here in open court having elected to stand upon his said motion to dismiss, and declining to plead further, it is therefore further

Adjudged, ordered, and decreed that the defendant, Harold L. Ickes, Secretary of the Interior, be, and he hereby is, directed to

vacate and set aside the adverse proceedings initiated by the Department of the Interior through the General Land Office in September 1931, described in paragraph 5 of the bill of complaint herein and being a certain challenge or contest no. 13003, serial 1429968, to the plaintiff's oil share placer claims, known and described as the Mt. Mamm no. 12, N½N½ sec. 1, no. 13, S½N½ sec. 1, no. 14, N½S½ sec. 1, no. 15, S½S½ sec. 1, no. 16, N½N½ sec. 12 and no. 17,
8 S½N½ sec. 12, all in township 8 south, range 94 west, sixth principal meridian, oil shale placers, and to set aside and vacate all subsequent proceedings taken and had in said contest, including the decision of the Commissioner of the General Land Office, declaring said placer claims of said plaintiff null and void; and to set aside and vacate all proceedings had and taken in accordance with said decision of said Commissioner; and said defendant is further directed to vacate and set aside his decision dated May 24, 1932, and each and every order issued thereunder, including the promulgation dated July 15, 1932, of said decision, declaring the said above-described placer claims of the plaintiff null and void.

It is further adjudged, ordered, and decreed that the defendant, Harold L. Ickes, Secretary of the Interior, be, and he hereby is, enjoined and restrained from instituting or taking any action or proceeding, interfering with or challenging or otherwise impairing the title of the plaintiff in and to said above-described oil shale placer claims, notwithstanding any failure of said plaintiff to perform the annual labor on said claims required by section 2324 of the Revised Statutes of the United States, for the year ending July 1, 1931, and thereafter.

JOSEPH W. COX, *Justice.*

No objection as to form of above decree.

O. H. GRAVES,
Attorney for Defendant.

Note of appeal

From the foregoing decree the defendant, Harold L. Ickes, Secretary of the Interior, notes an appeal in open court, which is hereby allowed.

JOSEPH W. COX, *Justice.*

In Supreme Court of District of Columbia

Order substituting party defendant

Filed March 10, 1933

Upon motion of the plaintiff in the above-entitled cause, and it appearing to the court that the defendant, Ray Lyman Wilbur, has resigned as Secretary of the Interior of the United States, and that Harold L. Ickes has been duly appointed and confirmed as, and now

is, the Secretary of the Interior of the United States, it is, this 10th day of March 1933, by the court,

Ordered, That Harold L. Ickes, as Secretary of the Interior of the United States, be, and he hereby is made, party defendant in this cause in the place and stead of said Ray Lyman Wilbur.

JOSEPH W. COX, *Justice.*

I consent:

O. H. GRAVES,
Atty. for Harold L. Ickes.

In Supreme Court of District of Columbia

Assignment of errors

Filed March 17, 1933

The defendant, Harold L. Ickes, Secretary of the Interior, by his attorney of record, O. H. Graves, alleges that errors have been committed by the Supreme Court of the District of Columbia in the above-entitled cause, as follows, to wit:

1. The court erred in overruling defendant's motion to dismiss.

2. The court erred in entering its decree in favor of the plaintiff and against the defendant.

3. The court erred in ordering the defendant to vacate and set aside the adverse proceedings initiated by the Department of the Interior through the General Land Office preferring charges against, and challenging the valid existence of, plaintiff's oil-shale placer claims; to vacate and set aside his holding therein that such claims are null and void; and to vacate and set aside all proceedings taken pursuant to such holding.

4. The court erred in enjoining and restraining the defendant from taking action to subject the land on which plaintiff's placer claims had been located, to the purposes of the leasing act, or otherwise to interfere with, challenge, or impair the title claimed by plaintiff, in and to the oil-shale placer claims described in the decree.

HAROLD L. ICKES,
Secretary of the Interior.
By O. H. GRAVES,
His Attorney of Record.

In Supreme Court of District of Columbia

Designation of the record

Filed March 17, 1933

The clerk, in preparing the transcript of the record for the Court of Appeals in this cause, will include the following papers therein:

1. The bill for mandatory injunction.
2. Motion to dismiss.

3. Order for substitution of party defendant.
4. Order denying motion to dismiss the bill of complaint and decree for mandatory injunction.
5. Assignment of errors.
6. This designation.

O. H. GRAVES,
Attorney for Defendant.

Service of a copy of the above designation acknowledged this 13th day of March 1933.

LOUIS TITUS,
CHARLES L. FRAILEY.
Attorneys for Plaintiff.

[*Clerk's certificate to foregoing transcript omitted in printing.*]

10 [File endorsement omitted.]

11 [Minute entry of argument, Nov. 6, 1933, omitted in printing.]

12 In Court of Appeals of the District of Columbia

No. 5956.

HAROLD L. ICKES, AS SECRETARY OF THE INTERIOR, APPELLANT

v.

VIRGINIA-COLORADO DEVELOPMENT CORPORATION

Appeal from the Supreme Court of the District of Columbia

Argued November 6, 1933. Decided January 22, 1934

Nathan R. Margold, Charles Fahy, and Victor H. Wallace, all of Washington, D.C., for appellant.

Louis Titus and Charles L. Frailey, both of Washington, D.C., for appellee.

Before MARTIN, Chief Justice, and ROBB, HITZ, and GRONER, Associate Justices.

Opinion

MARTIN, *Chief Justice:* This is an appeal of the Secretary of the Interior from a decree of mandatory injunction requiring him to vacate a decision promulgated by him whereby certain oil shale placer claims of the appellee were declared to be null and void.

The appellee, The Virginia-Colorado Development Corporation, as plaintiff below and hereinafter called the plaintiff, filed its bill below praying for an injunction against the appellant upon allegations in substance as follows:

That in June 1917, the plaintiff, under the mining laws then in force, located certain oil shale placer claims in Colorado known as the Mt. Mamm, nos. 12 to 17. It was required by the statutes (R.S. secs. 2324, 2325; 30 U.S.C.A. 28, 29), that until a patent was issued for the claims, "not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, * * * and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claims after failure and before such location."

That plaintiff from the time of the location of the claims in 1917, up to and including the year ending July 31, 1930, performed the assessment work of not less than $100 annually as required by the statute, but failed to perform such labor during the year ending July 31, 1931. That this default continued throughout the months of July, August, and part of September 1931, but plaintiff intended on and prior to September 4, 1931, to resume work upon the
13 claims, and had made arrangements to do so, and would have done so, had it not been prevented from performing such labor by the action of the Secretary of the Interior complained of in this case. That the plaintiff never at any time abandoned nor had any intention of abandoning the claims.

That on September 4, 1931, certain adverse proceedings were initiated by the Department of the Interior, through the General Land Office, against plaintiff's claims by the filing in the Land Office and posting on the claims of a challenge to the plaintiff's right and title thereto. This challenge was based solely upon the ground that plaintiff had failed to perform the assessment labor for the year ending July 31, 1931, and had not resumed such labor before the challenge was filed and posted. The challenge stated that the United States had therefore resumed possession of the land within the claims. It was not charged that the plaintiff's right or title to the claims was otherwise invalid, or ever had been so, or that plaintiff had abandoned the claims. It was based upon the sole ground that plaintiff's failure to perform assessment work for the year ending July 31, 1931, and before the filing of the challenge on September 4, 1931, had entitled the Secretary to declare a forfeiture of plaintiff's right and title to the claims and made them subject to cancellation by the Government. No relocation of the claims had been made or attempted by any other person or company during this period, nor had anyone made application to lease the lands from the Government.

That plaintiff contested the proceedings in the General Land Office, but the Commissioner held that plaintiff's claims were null and void, and upon appeal this decision was affirmed by the Secretary of the Interior. That on July 15, 1932, the Department's

decision was promulgated declaring the plaintiff's claims to be null and void, and asserting that the United States had taken possession of the lands within the claims for its own uses and purposes. The plaintiff seasonably objected to all of these purposes.

Thereupon plaintiff filed its bill in equity in the Supreme Court of the District of Columbia in the present case praying for a mandatory injunction requiring the Secretary of the Interior to vacate his decision declaring the plaintiff's claims null and void. The court below granted the decree prayed for, and enjoining the Secretary from taking any action interfering with plaintiff's title to the claims. The Secretary then appealed from this decision.

The question involved in this case is whether the failure of plaintiff to perform the annual assessment labor upon the claims in the year ending July 31, 1931, entitled the Government to declare a forfeiture of the claims and take possession thereof to the exclusion of all rights of the plaintiff. It is conceded by appellant that no such forfeiture was provided for under the Mining Law of May 10, 1872, R.S. secs. 2324, 2325, supra, under which plaintiff had located the claims, but it is contended that under the Leasing Act of February 25, 1920, 41 Stat. 437, such a right was vested in the Government, and the annual performance of labor on such locations was necessary to preserve the possessory right of the locator as against the Government.

We do not agree with this contention.

14 The Secretary's proceedings might be sustained if the present claims were governed by the provisions of the Leasing Act, but section 37 of that act contains a saving clause excepting from its provisions all "valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery."

It is contended by appellant that the claims now in question, although initiated under the mining laws, were not maintained in compliance therewith; and therefore were not excepted by the proviso from the operation of the Leasing Act. This contention is based upon the failure of the plaintiff to perform the annual labor for the year ending July 31, 1931. Appellant alleges that the plaintiff, consequently, is not entitled to the benefit of the saving clause aforesaid. We cannot agree with this position for the reason, as held by the Supreme Court of the United States with respect to such claims, in Wilbur v. Krushnic (280 U.S. 306, 314 (affirming United States ex rel Krushnic v. West, Secretary of the Interior, 58 App.D.C. 332; 30 F. (2d) 742)), that "prior to the passage of the Leasing Act, annual performance of labor was not necessary to preserve the possessory right, with all the incidents of ownership above stated, as against the United States, but only as against subsequent r[illegible]cators. So far as the Government was concerned, failure to do assessment work for any year was without effect." It follows

that inasumuch as the Government, prior to the passage of the Leasing Act, was without authority to declare a forfeiture of these claims because of the failure of plaintiff to perform the required annual assessment work, and inasmuch as the claims in question were saved out of the operation of the Leasing Act by the proviso above quoted, the action of the Secretary in his challenge of the plaintiff's claims and his resumption thereof for the United States, were without authority of law and were null and void.

It is claimed by appellant that it was error for the lower court to issue a writ of mandatory injunction against the Secretary of the Interior in this case. We are of the opinion that this contention is foreclosed by the decision of the Supreme Court of the United States in Wilbur v. Krushnic, supra. In that case it was held that the lower court possessed authority to issue a writ of mandamus against the Secretary based upon facts similar in principle to those involved in the present case. In view of that conclusion it follows that it was not error for the court in this case to issue a mandatory injunction to afford similar relief based upon similar facts.

The decree of the lower court is therefore affirmed.

A true copy.
Teste:

Clerk, Court of Appeals, D.C.

15 In Court of Appeals of District of Columbia

No. 5956. January Term 1934

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, APPELLANT

vs.

VIRGINIA-COLORADO DEVELOPMENT CORPORATION

Degree

January 22, 1934

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said Supreme Court in this cause be and the same is hereby affirmed.

Per Mr. Chief Justice MARTIN.

JANUARY 22, 1934.

Mr. Justice Van Orsdel took no part in the consideration or decision of this case.

16 In Court of Appeals of District of Columbia

[Title omitted.]

Designation of record

Filed March 26, 1934

The clerk, in the preparation of the transcript of record on petition for certiorari to the Supreme Court of the United States, will include the following, viz:

1. Record.
2. Argument of cause.
3. Opinion.
4. Decree.
5. This designation.
6. Clerk's certificate.

EDWARD T. BURKE,
Special Assistant to Attorney General; 408 Dept. of Justice.

17 [File endorsement omitted.]

18 [Clerk's certificate to foregoing transcript omitted in printing.]

19 Supreme Court of the United States

Order allowing certiorari

Filed May 21, 1934

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Endorsement on cover:) File no. 38,576. District of Columbia, Court of Appeals. Term no. 23. Harold L. Ickes, as Secretary of the Interior, petitioner, vs. Virginia-Colorado Development Corporation. Petition for a writ of certiorari and exhibit thereto. Filed April 19, 1934. File no. 23 of 1934.

U. S. GOVERNMENT PRINTING OFFICE, 1934

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52249—34

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. —

HAROLD L. ICKES, AS SECRETARY OF THE INTERIOR, petitioner

v.

VIRGINIA-COLORADO DEVELOPMENT CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of the Secretary of the Interior, prays that a writ of certiorari issue to review the decree of the Court of Appeals of the District of Columbia entered in the above-entitled cause on January 22, 1934. (R. 14.)

OPINIONS BELOW

No opinion was written by the Supreme Court of the District of Columbia. (R. 7.) The opinion of the Court of Appeals (R. 11–14) is reported at 69 F. (2d) 123.

JURISDICTION

The judgment of the Court of Appeals was entered January 22, 1934. (R. 14.) The jurisdiction

of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Does Section 37 of the Act of February 25, 1920, c. 85, 41 Stat. 437, 451, give to the Secretary of the Interior power, upon hearing, to cancel claims to oil shale lands initiated under the Mining Act of 1872, 17 Stat. 91, 92, being Section 2324 of the Revised Statutes, where the locator has neglected to perform assessment labor of the value of $100 or more during any assessment year, provided action to cancel such claim shall have been taken by the Secretary of the Interior before the owner of the claim resumes assessment work?

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 11–12.

STATEMENT

This is a suit in equity brought in the Supreme Court of the District of Columbia by the Virginia-Colorado Development Corporation, as plaintiff, against the Secretary of the Interior as defendant, in which a mandatory injunction was sought requiring the Secretary of the Interior to vacate and set aside his decision declaring certain oil shale placer claims, owned by plaintiff, to be null and void, and to vacate the proceedings upon which he based such decision. The essential facts alleged in the bill of complaint are as follows:

In June, 1917, under the Mining Act of 1872, the plaintiff located certain oil shale placer claims in Colorado known as the Mt. Mamm, Nos. 12 to 17. (R. 1.) That Act (*infra* p. 12) required that until a patent was issued for the claims "not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. * * * and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

The plaintiff from the time of the location of the claims up to and including the year ending July 31, 1930, performed the assessment work of not less than $100 annually as required by the statute, but failed to perform such labor during the year ending July 31, 1931. (R. 2.) This default continued throughout the months of July, August, and part of September, 1931 (R. 2), but the plaintiff intended to resume work upon the claims and would have done so had not the Secretary of the Interior taken the action complained of in this case. (R. 2.) Plaintiff had no intention of abandoning its claims. (R. 2.)

On September 4, 1931, proceedings were initiated by the Department of the Interior, through the General Land Office, against plaintiff's claims, by

the filing in the Land Office and posting on the claims of a challenge to the plaintiff's right and title thereto. (R. 2.) This challenge was based upon the ground that the plaintiff had failed to perform the assessment labor for the year ending July 31, 1931, and had not resumed such labor before the challenge was filed and posted. The challenge stated that the United States resumed possession of the land within the claims. (R. 2.) It was based upon the ground that the plaintiff's failure to perform assessment work for the year ending July 31, 1931, and before the filing of the challenge on September 4, 1931, entitled the Secretary to declare a forfeiture of the plaintiff's right and title to the claims and made them subject to cancellation by the Government. (R. 2.) No relocation of the claims had been made or attempted by any other person or company during this period, nor had anyone made application to lease the lands from the Government. (R. 2–3.)

The plaintiff contested the proceedings in the General Land Office, but the Commissioner held that the plaintiff's claims were null and void, and upon appeal this decision was affirmed by the Secretary of the Interior. (R. 3.) On July 15, 1932, the Department's decision was promulgated declaring the plaintiff's claims to be null and void, and asserting that the United States had taken possession of the lands within the claims for its own uses and purposes. (R. 3.)

The plaintiff contended that these proceedings were unauthorized, and that its claims were good

against the United States, notwithstanding its failure to perform assessment work. (R. 3–5.) The prayer was for a mandatory injunction to set aside the proceedings and decision. (R. 6.)

The defendant moved to dismiss the bill. (R. 7.) The motion was denied, the defendant declined to plead further, and a decree was entered as prayed in the bill. (R. 7–8.) This decree was affirmed by the Court of Appeals. (R. 14.)

SPECIFICATION OF ERRORS TO BE URGED

1. The Court of Appeals erred in holding that under Section 37 of the Mineral Leasing Act of 1920 the Secretary of the Interior was without authority to declare a forfeiture of the claims in question.

2. The Court of Appeals erred in holding that the action of the Secretary of the Interior in his challenge of the plaintiff's claims and his resumption thereof for the United States were without authority of law and were null and void.

3. The Court of Appeals erred in affirming the decree of the Supreme Court of the District of Columbia.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals of the District of Columbia has decided a question of substance relating to the construction of the Mineral Leasing Act of February 25, 1920, c. 85, 41 Stat. 437, *infra*, p. 11, which has not been, but should be, settled by this Court. The question is as to the effect, under Sec-

tion 37 of that Act, of a locator's failure to maintain a claim under the Mining Act of 1872, c. 152, 17 Stat. 91, 92, R.S. Sec. 2324, *infra*, p. 12, by annual assessment work, and whether, on such failure, the Government has any right to challenge the location. This question is not settled by *Wilbur* v. *Krushnic*, 280 U.S. 306, but was expressly saved by the following language in the opinion in that case (pp. 317–318):

> It is not doubted that a claim initiated under § 2324, R.S., could be maintained by the performance of annual assessment work of the value of $100; and we think it is no less clear that after failure to do assessment work, the owner equally maintains his claim, within the meaning of the Leasing Act, by a resumption of work, *unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened;* * * * (Italics ours.)

2. The question presented is of general importance. Many tracts of land of the character now subject to the Act of 1920, but which were embraced in locations under the Act of 1872, existing at the time of the passage of the later Act, now lie inactive through the failure of the locators to perform any assessment work or undertake any development thereof. Under the decision of the Court of Appeals such tracts cannot be leased under the Act of 1920, for the old locator may at any time reassert his claim by renewal of assessment work, and title to these tracts may, therefore, re-

main clouded indefinitely (barring provable abandonment).

3. The decision of the Court of Appeals is believed to be erroneous.

The Act of 1920 (Sec. 37) protects existing claims provided that they are "maintained in compliance with the laws under which initiated."

Claims may be so maintained by the continuous application of the annual assessment work required by the Act of 1872 or, failing that, by resumption after default and before any challenge by the Government. *Wilbur* v. *Krushnic*, 280 U.S. 306.

Here there was no maintenance in either of those ways: The assessment work was in default, and before its resumption the Government challenged the location. The court below, however, held that the claims cannot be challenged on this ground.

Before the Act of 1920, the holder of a location under the Act of 1872 had an estate subject to a condition subsequent. The condition was that he perform the assessment work required, and the result of failure was that his estate was subject to defeasance in favor of a relocator (Sec. 5, *infra*, p. 12). The Government was interested only, under the then policy, in keeping such lands open for private exploitation. It looked for no revenue directly, did not itself work mines, or lease land for that purpose. It, therefore, was well settled that it had no interest itself in whether the assessment

work was regularly done or not, and when $500 worth of work had been performed a patent could be called for, although in some years work had been omitted. *Wilbur* v. *Krushnic*, 280 U.S. 306, 317. But the estate of the locator was subject to defeasance, whenever work was in default, in favor of a private relocation.

The Act of 1920 indicates a complete new policy as to the lands within its scope. The Government no longer grants its coal and oil lands freely to locators and discoverers, conditioned only on development, but deals with them as resources to be preserved, either to be leased and revenue derived, or to be withheld from leasing altogether, in the public interest. *United States* v. *Wilbur*, 283 U.S. 414. As to such lands, the United States asserts its title, and for the first time becomes interested in the performance or non-performance by existing locators of the condition subsequent on which its prior grants were made.

By the same Act location (and therefore relocation) of oil and coal lands is abolished. Estates of existing locators are no longer subject to defeasance in favor of private relocators, because there can no longer be location or relocation of such claims. Accordingly, existing claims, if also free from challenge by the Government, are free of the condition subsequent upon which they were originally granted. Estates subject to a condition subsequent, and to defeasance for breach of the condi-

tion, in favor of any private relocator, have become perfected whether the condition is performed or not.

This cannot be the meaning of the Act of 1920. That Act provided, justly, for the protection of old claims, but only while they were "maintained in compliance with the laws under which initiated." If not "maintained" as stated, they must be subject to defeasance, as before. But the defeasance cannot operate exactly as before, because private relocation is no longer possible. Defeasance, therefore, must be at the challenge of the Government, which not only holds the ultimate title, but itself made the grant and imposed the condition of assessment work, and has now announced a policy giving it an interest in the observance of that condition. If the Government cannot now take advantage of the breach of the condition of assessment work, then no one can. Permitting it to do so, upon due notice and hearing in the Land Office (as was attempted here), conforms to the policy of both the Acts, and brings them into harmony. Denying such authority (as the courts below have done) is out of harmony with the policy of both the Acts:—with that of 1872 because it granted rights on a condition subsequent, which no longer exists in its original form and which under the decision below no longer exists at all; and with the Act of 1920 because it continued rights to claims while "maintained" under the old

laws, but which under the decision below cannot be challenged for failure to maintain them. Both Acts contemplate that oil and coal lands may be developed by some one, either the original locators, re-locators, or lessees. Under the decision below, if the original locators fail to move, it is impossible to clear the title (failing provable abandonment), and development by anybody else cannot occur.

It is quite clear that Congress did not intend, by the Act of 1920, to suspend the obligation to perform assessment work. It directly said that such claims must be "maintained"; and when Congress has intended a suspension, it has authorized it directly, for temporary periods. Pub. Res. No. 20, approved November 13, 1919, c. 106, 41 Stat. 354; Act of December 31, 1920, c. 8, 41 Stat. 1084. The practical effect of the decision below is a permanent suspension of the obligation, as to all coal and oil lands on which valid locations were outstanding on February 25, 1920. It is believed this is erroneous, and its result is to delay indefinitely the resumption by the Government of its title to these lands, and their development by anybody else.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Court of Appeals of the District of Columbia should be granted.

J. CRAWFORD BIGGS,
Solicitor General.

APRIL, 1934.

APPENDIX

The Mineral Leasing Act of February 25, 1920, c. 85, 41 Stat. 437 (U.S.C., Title 30, Secs. 181, 193):

SEC. 1. That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Act known as the Appalachian Forest Act, approved March 1, 1911 (Thirty-sixth Statutes, page 961), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, * * *.

SEC. 37. That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits described in the joint resolution entitled "Joint resolution authorizing the Secretary of the Interior to permit the continuation of coal mining operations on certain lands in Wyoming", approved August 1, 1912 (Thirty-seventh Statutes at Large, page 1346), shall be subject to disposition only in the form and manner provided in this Act, *except as to valid claims existent at date of the passage*

of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery. (Italics ours.)

Section 2324, Revised Statutes (Mining Act of May 10, 1872, c. 152, Sec. 5, 17 Stat. 91, 92):

> * * * On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. * * * and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. * * * (U.S.C., Title 30, sec. 28.)

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 23

HAROLD L. ICKES, AS SECRETARY OF THE INTERIOR, petitioner,

v.

VIRGINIA-COLORADO DEVELOPMENT CORPORATION

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The Supreme Court of the District of Columbia wrote no opinion (R. 7). The opinion of the Court of Appeals (R. 10–13) is reported in 69 F. (2d) 123.

JURISDICTION

The judgment of the Court of Appeals was entered January 22, 1934 (R. 13). Petition for writ of certiorari was filed April 19, 1934, and the writ was granted May 21, 1934 (R. 14). The jurisdiction of this Court rests on Section 240 (a) of the Ju-

dicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Does Section 37 of the Leasing Act of February 25, 1920, give to the Secretary of the Interior power, upon hearing, to cancel claims to oil shale lands initiated under the general mining law, where the locator has neglected to perform assessment labor of the value of $100 or more during any assessment year, provided action to cancel such claim shall have been taken by the Secretary of the Interior before the owner of the claim resumes assessment work?

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 21–22.

STATEMENT

This is a suit in equity brought in the Supreme Court of the District of Columbia by the respondent, Virginia-Colorado Development Corporation, against the Secretary of the Interior, in which a mandatory injunction was sought requiring the Secretary of the Interior to vacate and set aside his decision declaring to be null and void certain oil shale placer claims owned by the respondent. The essential facts alleged in the bill of complaint (R. 1–6) are as follows:

In June 1917, under the Mining Act of 1872, the respondent located certain oil shale placer claims in Colorado known as the Mt. Mamm, Nos. 12 to 17

(R. 1). That Act (Section 2324 of the Revised Statutes, *infra*, p. 22) required that until a patent was issued for the claims "not less than one hundred dollars' worth of labor shall be performed or improvements made during each year * * * and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives have not resumed work upon the claim after failure and before such location."

The respondent, from the time of the location of the claims up to and including the year ending July 1, 1930, performed the assessment work of not less than $100 annually as required by the statute, but failed to perform such labor during the year ending July 1, 1931. This default continued throughout the months of July, August, and part of September 1931 (R. 2).

On September 4, 1931, proceedings were initiated by the Department of the Interior, through the General Land Office, against the respondent's claims, by the filing in the Land Office and posting on the claims of a challenge to the respondent's right and title thereto. This challenge was based upon the ground that the respondent had failed to perform the assessment labor for the year ending July 1, 1931, and had not resumed such labor before the challenge was filed and posted. The

challenge stated that the United States resumed possession of the land within the claims. It was based upon the ground that the respondent's failure to perform assessment work for the year ending July 1, 1931, and before the filing of the challenge on September 4, 1931, entitled the Secretary to declare a forfeiture of the respondent's right and title to the claims and made them subject to cancellation by the Government (R. 2). No relocation of the claims had been made or attempted by any other person or company during this period, nor had anyone made application to lease the lands from the Government (R. 2).

The respondent contested the proceedings in the General Land Office, but the Commissioner held that the claims were null and void, and upon appeal this decision was affirmed by the Secretary of the Interior (R. 3). On July 15, 1932, the Department's decision was promulgated declaring the respondent's claims to be null and void, and asserting that the United States had taken possession of the lands within the claims for its own uses and purposes (R. 3).

The respondent contended that these proceedings were unauthorized, and that its claims were good against the United States, notwithstanding its failure to perform assessment work (R. 3–5). The prayer was for a mandatory injunction to set aside the proceedings and decision (R. 6).

The petitioner moved to dismiss the bill (R. 7). The motion was denied, petitioner declined to plead

further, and a decree was entered as prayed in the bill (R. 7–8). This decree was affirmed by the Court of Appeals (R. 13).

SPECIFICATION OF ERRORS TO BE URGED

1. The Court of Appeals erred in holding that under Section 37 of the Mineral Leasing Act of 1920 the Secretary of the Interior was without authority to declare a forfeiture of the claims in question.

2. The Court of Appeals erred in holding that the actions of the Secretary of the Interior in his challenge of the respondent's claims and his resumption thereof for the United States were without authority of law and were null and void.

3. The Court of Appeals erred in affirming the decree of the Supreme Court of the District of Columbia.

SUMMARY OF ARGUMENT

The question presented in the instant case is the precise question which was reserved by this Court in *Wilbur* v. *Krushnic*, 280 U.S. 306, 317, 318, when it held that an oil-shale placer claim, existent at the date of the passage of the Leasing Act of 1920, is "maintained" within the meaning of Section 37 of that Act (*infra*, p. 21) if, after default in the performance of annual assessment work, labor is resumed, "unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened." In the instant case such a challenge was asserted prior to the resump-

tion of work by the respondent, and we contend that in these circumstances the principles upon which the decision in the *Krushnic* case was based have no application here.

Section 37 of the Leasing Act (*infra*, p. 21) excepts from the operation of that Act "valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated." The only requirement for the maintenance of a claim under the old mining law, once the claim had been perfected, was the requirement in Section 2324 of the Revised Statutes (*infra*, p. 22) as to the performance of annual assessment work. That requirement constituted a condition subsequent to the right of exclusive possession granted by the United States to the locator. Failure to comply with the condition opened the claim to relocation by another. It did not, however, result in forfeiture of the claim as against the Government, for the Government had no direct interest in the matter, being concerned only with seeing that its mineral-bearing lands were kept open for private exploitation.

The Leasing Act of 1920 effected a complete change of policy in respect of lands containing oil and oil shale. The practice of location was abolished, and a system of leasing, subject to payment of royalties, substituted in its place. Consequently, relocation became impossible, the Government's offer to locators having been withdrawn. Thus the locator who fails to perform assessment work no

longer runs the risk of having his claim appropriated by a rival claimant, and if the court below was correct in holding that the Government may not take advantage of the default, the right which was subject to a condition when initiated is now unconditional. We do not think this can have been the intention of Congress, for the result is out of harmony with the evident policy of both the old mining law and the 1920 Act. It would hinder the disposition of lands under the Act and deprive the Government of royalties, although the lands were not being diligently exploited by the claimant.

The Leasing Act of 1920 places no additional burden on the locator. Under the provisions of the Act of 1872 (Sec. 2324 R.S., *infra*, p. 22) he is required, during each assessment year, to perform labor on his claim of the value of $100.00 or more. Under the Leasing Act of 1920 the same exactions are required of him. However, if he fails to perform such labor, then, by the terms of the Leasing Act the United States is given the right to challenge the validity of the claim by reason of such default. The possibility of relocation is taken away and the possibility of intervention is substituted in its place. The risk is substantially the same.

If we are correct in construing the Leasing Act as giving the Government the right to resume possession of oil lands when the locator fails to perform assessment work, then we think there can be no doubt that the Secretary of the Interior, being

the official in charge of public lands, has authority to institute proceedings to that end, although the Leasing Act does not expressly so provide.

We submit that the contentions advanced by the respondent in the court below, including the contention that the Leasing Act as construed by the Government takes private property for public use in contravention of the Constitution, are unsound. We submit further that the decision below is erroneous and should be reversed.

ARGUMENT

In *Wilbur* v. *Krushnic*, 280 U.S. 306, there was involved the question whether an oil shale placer claim, valid at the date of the enactment of the Leasing Act of 1920, was automatically extinguished by subsequent failure to perform annual assessment work as required by Section 2324 of the Revised Statutes (*infra*, p. 22) and could be declared forfeit by the Government on account of such failure, when work had been resumed on the claim before the Government took steps to declare a forfeiture. This Court held that the claim was not extinguished, and said (pp. 317–318):

> It is not doubted that a claim instituted under § 2324, R.S., could be maintained by the performance of annual assessment work of the value of $100; and we think it is no less clear that after failure to do assessment work, the owner equally maintains his claim, within the meaning of the Leasing Act, by a resumption of work, *unless at least some*

> *form of challenge on behalf of the United States to the valid existence of the claim has intervened;* * * * (Italics ours.)

The question presented in the instant case is the precise question that was reserved in the *Krushnic* case by the language quoted in italics above. The respondent's claim was admittedly a valid claim in existence at the date of the passage of the Leasing Act. During the year ending July 1, 1931, however, no assessment work was performed, and in September 1931, while the respondent was still in default, the United States instituted proceedings to resume possession of the land. The challenge, as in the *Krushnic* case, was predicated on Section 37 of the Leasing Act (*infra*, p. 21), which provides that the disposition of public lands containing deposits of coal, phosphate, oil, oil shale, and gas shall be governed exclusively by the provisions of that Act, with the following exception:

> except as to valid claims existent at date of the passage of this Act *and thereafter maintained in compliance with the laws under which initiated,* which claims may be perfected under such laws, including discovery. (Italics ours.)

The court below held that because the Government could not have challenged the maintenance of a claim prior to the passage of the Leasing Act it is precluded from doing so now by Section 37, *infra*, which preserves existing rights under the prior law. It is our contention that the principles

upon which the rule referred to by the court was based are not applicable here, and that the policy expressed in the Leasing Act affirmatively requires that the Government be permitted to resume possession of a claim which is not duly maintained.

We think it cannot be seriously doubted that in excepting from the terms of the Leasing Act existing claims "maintained in compliance with the laws under which initiated", Congress had in mind primarily compliance with the requirement as to annual assessment labor. That requirement, found in Section 2324 of the Revised Statutes (*infra*, p. 22), was the only one imposed upon locators as a condition to the preservation of the right secured by a perfected location. Moreover, the frequency with which "maintained", or equivalent expressions, such as "kept up", "kept alive", "preserved", are encountered in the opinions of this Court in connection with annual assessment work (see *Gwillim* v. *Donnellan*, 115 U.S. 45, 48; *El Paso Brick Co.* v. *McKnight*, 233 U.S. 250, 256; *Union Oil Co.* v. *Smith*, 249 U.S. 337, 349; *Cole* v. *Ralph*, 252 U.S. 286, 295) shows that those words had a well-understood meaning. This Court appears to have so construed the Act when it decided the *Krushnic* case, and the court below did not hold otherwise.

The obligation to perform annual assessment labor was a condition subsequent to the right of exclusive possession granted by the United States. *Union Oil Co.* v. *Smith, supra; Black* v. *Elkhorn*

Mining Co., 163 U.S. 445, 450. Failure to comply with the condition rendered the right of possession defeasible, for the statute provided that in case of default in the performance of annual assessment work the claim should be open to relocation just as if no location had ever been made. The right might, however, be preserved by resumption of labor prior to relocation by another.

Section 2324, *infra*, made no provision for reversion to the Government of the right of possession in the event of default, and it was well settled that default did not result in forfeiture of the claim as against the United States. *Wilbur* v. *Krushnic*, *supra*, p. 317. The reason for this may readily be apprehended. Prior to 1920 the United States asserted no direct interest in the mineral deposits lying within the public domain. It did not itself make any effort to extract them for public use, nor did it attempt to secure revenue by leasing the lands to others. The policy was to permit free exploration and occupation without payment of rent or royalties. See Section 2319 of the Revised Statutes (U.S.C., Title 30, Sec. 22); *Union Oil Co.* v. *Smith*, *supra*, p. 346; *Cole* v. *Ralph*, *supra*, p. 294. And the only purpose of Section 2324 was to keep mineral-bearing lands open to private exploitation by persons willing and able to develop them; or, as this Court said in *Chambers* v. *Harrington*, 111 U.S. 350, 353:

> to require every person who asserted an exclusive right to his discovery or claim to

expend something of labor or value on it as evidence of his good faith, and to show that he was not acting on the principle of the dog in the manger.

It may be assumed that the Government's interest in preventing its mineral lands from being monopolized by those who were either unwilling or unable to develop them was sufficiently protected by exposing locators to the risk of having their claims appropriated by rival claimants. In any event, it is obvious that no good purpose was to be served by permitting repossession by the Government itself, when the Government had no intention of doing anything but reassign the land to some other private individual for his own use and benefit.

These considerations, we submit, formed the basis for the rule upon which the court below relied, and which it held to be decisive of the instant case, namely, that faithful performance of annual assessment work is not necessary to preserve or maintain the right to possession of a mining claim as against the Government.

The Leasing Act of 1920, however, effected a complete change of policy in respect of lands containing coal, phosphate, oil, oil shale, or gas. The Government no longer grants its coal and oil lands freely to discoverers and locators, conditioned only on development, but deals with them as resources to be conserved. Such lands, under the present system, are open only to lease, subject to payment

of royalty to the United States, and may, if the public interest requires, be withheld from private exploitation altogether. *United States* v. *Wilbur*, 283 U.S. 414; *West* v. *Work*, 11 F. (2d) 828, 831 (App.D.C.), certiorari denied, 271 U.S. 689.

The effect of the Leasing Act was to abolish "location" of oil claims, and likewise "relocation." A relocation, as much as an original location, is a direct grant from the Government. There is no privity of title between the relocator and his predecessor in possession (*Lavagnino* v. *Uhlig*, 198 U.S. 443, 452), for the claim of the latter, rendered defeasible by the failure to perform assessment work, is extinguished by the act of relocation, and the relocator acquires his rights from the United States, the owner of the fee. *Swanson* v. *Kettler*, 17 Idaho 321, 336, affirmed, *sub nom. Swanson* v. *Sears*, 224 U.S. 180. This Court said in *Belk* v. *Meagher*, 104 U.S. 279, 285:

> As the proceeding to locate is one in which the United States is not directly an actor, but is carried on by the locator alone, so that he may take what the United States has, through an act of Congress, offered to give, it is clear that there can be nothing to take until there is an offer to give.

In that case, at the date of the attempted relocation, the United States had nothing to give because the land was embraced in a subsisting location which was still indefeasible, the period during which assessment work might be timely performed

not having expired. In the present case, when the respondent defaulted in the performance of annual labor, the United States had withdrawn its offer to give under the general mining law, so that the claims of the respondent were no longer exposed to forfeiture by relocation. Cf. *Swanson v. Sears, supra,* p. 182. It follows that if the decision below is correct these claims, although subject to a condition subsequent when initiated, have become wholly indefeasible by virtue of the Leasing Act, and the respondent may now disregard the obligation to develop and improve the claims without fear of loss or impairment of his estate.

We submit that this cannot have been the intention of Congress. The Leasing Act very properly provided for the protection of existing claims, but only so long as they were "maintained in compliance with the laws under which initiated." If not maintained as required by the Act, they must be subject to defeasance as before. But failure to fulfill the condition subsequent cannot have the effect provided by Section 2324 of the Revised Statutes, for, as has been pointed out, relocation is no longer possible. Defeasance must, therefore, be at the challenge of the Government, which not only holds the ultimate title, but has now announced a policy giving it a definite and direct interest in the observance of the condition.

If the Government cannot take advantage of the default, then no one can. The result is out of harmony with the policy of both Section 2324 of the

Revised Statutes and the general Leasing Act, for the condition subsequent in Section 2324, designed to keep valuable mineral claims in active development, not only no longer exists in its original form but, under the decision below, is wholly abrogated; while the evident intent of Congress to preserve claims only so long as they are "maintained" under the old law is defeated by reason of the inability of anyone to assert the failure to maintain.

The practical effect of the decision below is to render the estate of the locator terminable only at his will and pleasure, no matter how negligent he has been in developing the land. He may hold the claim against any applicant under the Leasing Act and against the Government itself, provided only he does not actually abandon it. The result is that the status of lands containing oil shale or any of the other minerals named in the Act may be extremely difficult of ascertainment if the title is clouded by notices of location made prior to 1920. The Government will be put to the necessity of establishing by evidence *aliunde* that the claims have been abandoned, for abandonment depends largely on intention, and mere absence or failure to work the claim for any definite time is not sufficient to prove that it has been abandoned. *Black* v. *Elkhorn Mining Co.*, 163 U.S. 445, 450; *Peachy* v. *Frisco Gold Mines Co.*, 204 Fed. 659 (D. Arizona). See also Lindley, *Mines* (3d ed.), Secs. 642–644. We do not think Congress can have intended that

the disposition under the Leasing Act of mining claims not in active development should be thus impeded.

It is true that the Leasing Act does not expressly authorize the Secretary of the Interior to take steps to resume possession of claims that are not "maintained" within the meaning of the Act, but we submit that if the right of repossession exists in the Government, the broad authority vested in the Secretary of the Interior is sufficient to empower him to enforce that right. As this Court said in *Cameron* v. *United States*, 252 U.S. 450, 459, 460, 461:

> By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the land department, as a special tribunal; and the Secretary of the Interior, as the head of the department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved. * * *
>
> * * * * *
>
> Of course, the land department has no power to strike down any claim arbitrarily, but so long as the legal title remains in the Government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void. * * *

> True, the mineral land law does not in itself confer such authority on the land department. Neither does it place the authority elsewhere. But this does not mean that the authority does not exist anywhere, for, in the absence of some direction to the contrary, the general statutory provisions before mentioned vest it in the land department. * * *

The Court was there speaking of the Secretary's right to determine the validity of a claim in its inception, but we think the same principles are applicable here, assuming the existence of the Government's right to repossess. See also *Federal Shale Oil Co.*, 53 L.D. 213, 216–217.

The respondent, in the court below, urged that the Government's position was inconsistent with this Court's decision in the *Krushnic* case because it rested on the proposition that failure to perform assessment work renders a claim invalid, whereas this Court said that resumption of work "does not *restore* a *lost* estate" but "*preserves* an *existing* estate" (280 U.S. 306, 318). We submit that there is no inconsistency whatsoever. We do not contend that the respondent's claim was invalid, in the sense that it had ceased to have any existence in law. Our contention is—and we think it is amply supported by the authorities which have been cited—that the claim had become defeasible by reason of the failure to comply with Section 2324. The fact

that default in the performance of assessment work does not *ipso facto* forfeit a claim or render it void does not mean that the estate of the locator continues in all its original vigor. A valid claim, so long as it is maintained in accordance with Section 2324, is impregnable, but when the requirements of that section are no longer observed the right of possession ceases to be *exclusive,* and upon relocation by another is lost altogether. This must be so, for, if it were otherwise, relocation during the period of default would be a trespass. Consequently, it is not correct to say, as the respondent did in its brief below, that a claim must be either wholly valid or wholly invalid, and that since this Court has held that a claim in default is not wholly invalid, such a claim must be wholly valid. The distinction between "void" and "voidable" is a familiar one. A claim that is "voidable" is not of the same dignity as one that is valid in every respect, and yet it is not a void or invalid claim. So here, failure to do assessment work renders a claim "voidable" at the instance of an adverse claimant. Resumption of work prior to relocation does not "restore" a "lost" estate, but it "preserves" the estate by rendering it once more indefeasible.

The respondent also suggested in the court below that in holding in the *Krushnic* case (280 U.S. 306, 317-318) that a claim is "maintained" after failure to do assessment work if work is resumed prior to relocation, unless "some form of challenge

on behalf of the United States to the valid existence of the claim has intervened", this Court had reference only to a possible challenge to the validity of the claim apart from the question of assessment labor. But if default in the performance of assessment work be excluded, the only possible grounds of challenge, aside from deliberate abandonment, would be those going to the validity of the claim or location *ab initio*. It seems clear, however, that the Court was speaking of claims assumed to be valid as of the date of the Leasing Act, for we submit that if a claim was void or voidable in its inception no amount of assessment work would prevent the Government from challenging its validity, and the question whether a challenge had "intervened" prior to resumption of work or had not been asserted until later would be immaterial. See opinion of the Interior Department adjudicating the respondent's claims, 53 L.D. 666. This interpretation of the Court's opinion is supported by the fact that the subject under consideration was whether the claimant had complied with the requirement of Section 37 that the claim be "maintained", not whether the claim was valid at the date of the passage of the Act.

Finally, the respondent urged that if the Government's interpretation of the Leasing Act is correct, that Act deprives the respondent of its property without due process of law. The argument is that the respondent has a vested right, subject to defeasance upon failure to perform annual assess-

ment work, but subject to such defeasance only by relocation; and that if the Act renders the claim defeasible at the instance of the Government, it impairs a vested right and takes private property for public use without payment of compensation. But the Act does not add to the respondent's burden. The possibility of relocation is taken away, and the possibility of intervention by the Government is substituted in its place. The risk is substantially the same. In either case the locator still has the right to resume work before intervention occurs (*Wilbur* v. *Krushnic*, 280 U.S. 306), and we submit it makes no real difference to him whether it is the Government or a private individual who may take advantage of his default.

CONCLUSION

We respectfully submit that the judgment of the court below should be reversed.

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SEPTEMBER 1934.

APPENDIX

The Mineral Leasing Act of February 25, 1920, c. 85, 41 Stat. 437 (U.S.C., Title 30, Secs. 181, 193):

> * * * That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Act known as the Appalachian Forest Act, approved March 1, 1911 (Thirty-sixth Statutes, page 961), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to any association of such persons, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, * * *.
>
> SEC. 37. That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits described in the joint resolution entitled "Joint resolution authorizing the Secretary of the Interior to permit the continuation of coal mining operations on certain lands in Wyoming", approved August 1, 1912 (Thirty-seventh Statutes at Large, page 1346), shall be subject to disposition only in the form and manner provided in this Act, *except as to valid claims existent at date of the passage of this Act and thereafter maintained*

in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery. (Italics ours.)

Section 2324, Revised Statutes (Mining Act of May 10, 1872, c. 152, Sec. 5, 17 Stat. 91, 92):

> * * * On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. * * * and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives have not resumed work upon the claim after failure and before such location. * * *
>
> (U.S.C., Title 30, Sec. 28.)

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No. 23

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

HAROLD L. ICKES, AS SECRETARY OF THE INTERIOR, *Petitioner*,

vs.

VIRGINIA-COLORADO DEVELOPMENT CORPORATION.

BRIEF FOR RESPONDENT.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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No. 23

IN THE

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HAROLD L. ICKES, AS SECRETARY OF THE INTERIOR, *Petitioner*,

vs.

VIRGINIA-COLORADO DEVELOPMENT CORPORATION.

BRIEF FOR RESPONDENT

PRELIMINARY STATEMENT

The Virginia-Colorado Development Corporation, respondent here, filed its bill in equity in the Supreme Court of the District of Columbia against the Secretary of the Interior, praying for a mandatory injunction requiring the Secretary to vacate and set aside a decision rendered by him to the effect that certain oil shale placer mining claims, belonging to respondent, were null and void. The Secretary moved to dismiss the bill. This motion was overruled by the Supreme Court of the District, and the Secretary, declining to plead further, the Court entered a decree commanding the Secretary of the Interior to vacate and set

*Italics ours wherever used.

aside his decision. Upon appeal to the Court of Appeals of the District, that judgment was affirmed. The case is here upon a petition for certiorari granted by this Court. Respondent is not satisfied with the statement found in the brief of petitioner and therefore deems it necessary to submit its own statement.

STATEMENT OF FACTS

The facts alleged in the bill, all of which are admitted here, are substantially as follows:

1. During the month of June, 1917, respondent located and duly perfected the location of six oil shale placer mining claims in the State of Colorado, under the Act of Congress approved May 10, 1872 (Section 2324 Revised Statutes, Section 28, Title 30, USCA). (R. 1.)

2. Thereafter respondent performed labor and made improvements on each of said claims of the value of at least $100 during each succeeding year, down to and including the year ending July 1, 1930. For the year ending July 1, 1931, respondent did not perform such labor or make such improvements on any of said claims. However, respondent had not abandoned said claims, nor had it any intention of abandoning the same. On the contrary it intended to resume work thereon, and on September 4, 1931, respondent had made all arrangements for the resumption of such annual work and would have resumed the same had it not been for the action of the Secretary taken on that date, as hereinafter shown. (R. 1, 2.)

3. On September 4, 1931, adverse proceedings were initiated by the Department of the Interior, through the General Land Office, against each of said claims. Said adverse proceedings contained the charge that plaintiff had not performed labor or made improvements on any of said claims of the value of $100 for the year ending July 1, 1931, and had not resumed such work prior to the date of filing the adverse proceedings. Said adverse proceedings also

contained the statement that the United States resumed possession of said land. No other charge of any kind was contained therein, and said adverse proceedings were based solely upon the ground that respondent had failed to perform the annual assessment work on said claims for the year ending July 1, 1931, and had not resumed said work before the institution of such adverse proceedings. It was alleged in the adverse proceedings that, by reason of this fact, respondent had forfeited its title and right of possession to said claims, and that therefore such claims were subject to cancellation. (R. 2.)

4. Respondent filed its answer to said adverse proceedings, admitting that it had failed to perform the assessment work for the year ending July 1, 1931, but claimed a right to resume performance of the annual assessment work. Thereafter the Commissioner of the General Land Office held that plaintiff's claims were null and void, and upon appeal to the Secretary, that official affirmed the decision of the Commissioner. (R. 3.)

5. None of said claims have ever been relocated by any person, nor has any application ever been made by any person to lease said claims from the United States. (R. 2.)

6. The action of the Secretary was arbitrary and unlawful and beyond the jurisdiction of the Secretary to make, and said order has cast a cloud upon respondent's title to said claims and has created a doubt as to the right of respondent to resume the annual work thereon, which it is ready, willing and anxious to do, and will resume the same if the decision of the Secretary be set aside. (R. 5, 6.)

STATEMENT OF CASE

The placer mining claims, which are in controversy here, were located by respondent in 1917 under the provisions of the Act of Congress approved May 10, 1872 (Sections 2324 Revised Statutes, Section 28, Title 30, USCA). At that time the Act of May 10, 1872, was in full force and effect.

After these claims had been legally and validly located, Congress passed another act known as the Mineral Leasing Act of February 25, 1920 (41 Stat. 437, Sections 181-193, Title 30 USCA). After the passage of the Leasing Act, said minerals therein named (coal, phosphate, sodium, oil, oil shale and gas) could be acquired from the United States only under the terms of that Act, except where valid claims had already been initiated and maintained under the previous mining law. The placer mining law, under which these claims were initiated, required that on each mining claim there be performed not less than $100 worth of labor, or improvements made, during each year. The statute further provides that, upon a failure to perform such labor or make such improvements, the claim shall be open to relocation in the same manner as if no location had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, had not resumed work before such new location.

The Leasing Act of 1920 provided that the mineral lands of the United States, described therein, should be subject to disposition only under that Act, "*except as to valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery.*"

It is to be noted that these claims were initiated in 1917, that for thirteen years thereafter respondent performed the annual assessment work of the value of $100 on each claim, and that such claims were admittedly valid in every respect down to the first day of July, 1931. It is also admitted that respondent had no intention of abandoning these claims, and had actually made arrangements to resume the assessment work thereon, and intended to and would have resumed such work had it not been for the action of the Department on September 4, 1931, in filing adverse proceedings challenging the validity of the claims and the right of respondent to resume work thereon. It

is also admitted that had respondent actually resumed said work prior to the filing of the contest, the claims would still have been valid claims, with the unquestioned right in the respondent to apply for and secure a patent from the United States therefor.

QUESTION PRESENTED

The sole question presented is whether the Secretary of the Interior was given, by the Leasing Act, a power which he had not theretofore had, that is, the power to cancel, through adverse proceedings, an otherwise valid mining claim, initiated prior to the Leasing Act, on account of a failure for a few months to do annual assessment work, where the owner had not abandoned the claim but had actually made arrangements for the resumption of the annual work at the time the adverse proceedings were filed, and would have resumed such work had such proceedings not been filed, and where such mining claim had not been relocated by others nor had any application been made to the United States for a lease thereon.

SUMMARY OF ARGUMENT

1. Prior to the passage of the Leasing Act in 1920, the Secretary of the Interior had no power to declare a mining claim forfeited for failure to do assessment work. The Secretary did have the power under proper proceedings to declare a mining claim void for fraud or lack of discovery or other defect, or he could declare the claim cancelled by reason of a subsequent abandonment. *Cameron v. United States*, 252 U. S. 450; *Black v. Elkhorn Mining Company*, 163 U. S. 445; *Farrell v. Lockhart*, 210 U. S. 142; *Brown v. Gurney*, 201 U. S. 184. But he had no power to declare the claim forfeited because of failure to do the annual assessment work. *Wilbur v. Krushnic*, 280 U. S. 306. The only penalty for failure to do the annual assessment work, to which the locator was subject, was a possible reloca-

tion of his claim by some other person prior to the resumption of work by the original locator, in which event the original locator would lose his claim.

2. The Leasing Act provided that deposits of coal, phosphate, sodium, oil, oil shale and gas should thereafter be subject to lease only, not to location. But one important exception was provided in the Act. That exception reads as follows:

> "except as to valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery."

It is thus clear that the Secretary was given no power to cancel a claim for any reason other than those furnishing a ground of cancellation prior to the passage of the Leasing Act. On the contrary, every right which the owner of a valid existing claim had at the time of the passage of the Leasing Act was preserved by such Act.

3. The Leasing Act provides that valid existing claims might be "maintained" under the prior law. The word "maintain" means "to preserve," "to keep in existence," "not to allow to fail." C. J. Vol. 38 p. 334-337. Prior to the passage of the Leasing Act, one of the ways in which a claim might have been maintained was to resume annual assessment work prior to other location. *Wilbur v. Krushnic,* 280 U. S. 306. Therefore it may be maintained in the same way now.

4. Petitioner contends that because the Leasing Act removed the hazard of relocation, the original locator is thus given an advantage which he had not theretofore had, and that, therefore, this Court must read into the Leasing Act some compensating disadvantage, and petitioner thinks that a reasonable compensating disadvantage would be to give the Secretary of the Interior a right to cancel the claim for failure to do assessment work. He thus asks this

Court to read into the statute an entirely new provision which Congress did not see fit to insert. But nothing may be implied in a statute except that which is necessary to clear up some ambiguity. In the amendment to the Alaska Mining Law of March 2, 1907, Congress provided that claims in Alaska were forfeited by failure to do the annual labor, but it made no such provision for the rest of the United States. Petitioner now asks this Court to make the Alaska law apply to the rest of the country. But this Court can not read into a statute a provision which Congress deliberately omitted.

5. The title of respondent to its claims having been clouded by the unlawful action of the Secretary, a mandatory injunction is the proper remedy.

ARGUMENT

I

Prior to Passage of Leasing Act a Failure to Do Assessment Work Did Not Affect Validity of Mining Claim.

Nothing is better settled in mineral law than that the failure of a locator to do annual assessment work in the absence of another location did not affect the vaildity of a mining claim. *Wilbur v. Krushnic* 280 U. S. 306. In that case the court said at page 317 of the opinion:

> "Prior to the passage of the Leasing Act, annual performance of labor was not necessary to preserve the possessory right, with all the incidents of ownership above stated, as against the United States, but only as against subsequent relocators. So far as the government was concerned, failure to do assessment work for any year was without effect.
>
> "While he is required to perform labor of the value of $100 annually, a failure to do so does not *ipso facto* forfeit the claim, but only renders it subject to loss by relocation. And the law is clear that no relocation can be made if work be resumed after default and before such relocation."

II

Prior to Leasing Act the Secretary of the Interior Had No Power to Declare a Mining Claim Forfeited for Failure to Do Assessment Work.

Prior to the passage of the Leasing Act in 1920, the Secretary of the Interior had power, under proper proceedings, to declare a mining claim void for fraud or lack of discovery, or other defect. *Cameron v. United States* 252 U. S. 450. In that case this Court said at page 460 of the opinion:

> "Of course, the land department has no power to strike down any claim arbitrarily, but so long as the legal title remains in the Government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void."

The abandonment of a claim by the locator cancelled the claim, even though the annual assessment work might have been done. *Black v. Elkhorn Mining Company* 163 U. S. 445; *Farrell v. Lockhart* 210 U. S. 142; *Brown v. Gurney* 201 U. S. 184. It therefore follows under the doctrine announced in *Cameron v. United States*, that the Secretary of the Interior, prior to the passage of the Leasing Act, had power to declare a claim cancelled by reason of its abandonment. But the failure to do annual assessment word did not render the claim invalid, nor did it have any effect of which the Secretary could take notice in the absence of another location prior to the resumption of such assessment work. In the absence of such relocation the claim was still a valid claim. *Wilbur v. Krushnic* 280 U. S. 306. It therefore follows that the Secretary had no power to declare a claim forfeited for failure to do the annual work where there has been no relocation.

III

Leasing Act Gave Secretary No Power to Declare Claims Forfeited for Lack of Assessment Work, on the Contrary That Act Specifically Preserved All Rights as to Valid Existing Claims.

The Leasing Act of 1920 provides that deposits of coal, phosphate, sodium, oil, oil shale and gas should not thereafter be subject to location under the general mining laws, but should be subject only to lease in the manner provided in the Act. But it specifically excepted valid claims in existence at the date of the passage of the Act, and provided that such claims might be maintained and perfected under the old law. The pertinent portion of the statute is as follows:

> "SEC. 37. That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits described in the joint resolution entitled 'Joint resolution authorizing the Secretary of the Interior to permit the continuation of coal mining operations on certain lands in Wyoming', approved August 1, 1912 (Thirty-seventh Statutes at Large, page 1346), shall be subject to disposition only in the form and manner provided in this Act, *except as to valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery.*" (Italics ours.)

It thus appears that Congress specifically intended to reserve to the owners of existing locations every right which they had prior to the passage of the Leasing Act. One of those rights was the right of the owner to resume his annual assessment work after default in such work, at any date prior to a relocation by some other person and prior to his own abandonment of such claim. As this Court said in *Wilbur v. Krushnic*, 280 U. S. at page 317 of this opinion:

> "Whenever $500 worth of labor in the aggregate had been performed, other requirements aside, the owner became entitled to a patent, even though in some years annual assessment labor had been omitted."

As we have seen, the Leasing Act excepted from its operations valid existing claims thereafter maintained in compliance with the law under which the claims were initiated. The word "maintain" means "to preserve," "to keep in existence," "not to allow to fail." C. J. Vol. 38 p. 334-337.

Prior to the passage of the Leasing Act one of the ways in which a claim might be maintained was to resume annual assessment work prior to location by some other person. Again quoting from *Wilbur v. Krushnic*, 280 U. S. 306, this Court said at page 318 of the opinion:

> "Resumption of work by the owner, unlike a relocation by him, is an act not in derogation but in affirmance of the original location; and thereby the claim is 'maintained' no less than it is by performance of the annual assessment labor. Such resumption does not *restore a lost* estate—see *Knutson v. Fredlund*, 56 Wash. 634, 639; it *preserves* an *existing* estate."

As one of the rights which a locator had prior to the Leasing Act was the right to resume work, prior to a relocation, in order to *"preserve an existing estate,"* and as Congress specifically provided in the Leasing Act that a locator of a valid existing claim should have every right that he had prior to the passage of such Act, it follows that a locator of such a claim, after a lapse in assessment work, has the same right to resume such work that he would have had, had the Leasing Act never been passed.

IV

Right of Locator to Maintain His Claim by Resuming Assessment Work Can Not be Taken Away by Implication Nor by Reading Into the Statute Something Which Is Not There.

The petitioner contends that because the Leasing Act prevented any other person from relocating an existing claim after a lapse in the annual assessment work, that the statute thus put the locator in a better position than he was before the passage of the Act, and petitioner therefore contends that this Court should read into the Act some compensating disadvantage in order to offset the advantage which the locator thereby gained. And petitioner thinks that a reasonable compensating disadvantage would be to give the Secretary of the Interior a right to cancel the claim for failure to do assessment work. Petitioner concedes that prior to the passage of the Leasing Act the Secretary had no such power, but contends that it is only reasonable for this Court to read into the statute some disadvantage, which Congress did not see fit to place there, in order to offset the advantage which Congress had given the owner of an existing claim by eliminating the hazard of a relocation. On page 20 of the brief petitioner uses the following language:

> "But the Act does not add to the respondent's burden. The possibility of relocation is taken away, and the possibility of intervention by the Government is substituted in its place. The risk is substantially the same. In either case the locator still has the right to resume work before intervention occurs (*Wilbur v. Krushnic*, 280 U. S. 306), and we submit it makes no real difference to him whether it is the Government or a private individual who may take advantage of his default."

Even if it be true that a claim, existing at the passage of the Leasing Act, is not subject to relocation upon a

failure of assessment work, the argument is not sound. It might have been a legitimate argument, if addressed to Congress when the Act was under consideration by that body. But Congress did not see fit to include in the Act a right to cancel the claim for failure to do assessment work. On the contrary, it particularly provided that existing valid claims might be maintained under the original law. What the purpose of Congress was in not giving the Secretary the additional power, which petitioner thinks he should have been given, is not disclosed by the statute, but in any event, Congress has spoken and this Court can not, by a construction of the statute, read into it something which Congress deliberately omitted.

Where the language of a statute is plain, there is no room for construction. Construction may be only invoked to clear up an ambiguity. In the case of *Van Camp & Sons v. Am. Can. Co.* 278 U. S. 245, the court said on page 253 of the opinion:

> "But the general rule that 'the province of construction lies wholly within the domain of ambiguity,' *Hamilton v. Rathbone*, 175 U. S. 414, 419, 421, is too too firmly established by the numerous decisions of this Court either to require or permit us to do so.

See also *Thompson v. United States* 246 U. S. 547; *Commissioner v. Gottlieb*, 265 U. S. 310; *Corona Co. v. United States* 263 U. S. 537; *United States v. First National Bank* 234 U. S. 245. In the latter case this Court said on page 260 of the opinion:

> "The responsibility for the justice or wisdom of legislation rests with the Congress, and it is the province of the courts to enforce, not to make, the laws. *St. Louis, Iron Mt. & S. Ry. Co. v. Taylor*, 210 U. S. 281, 294; *Texas Cement Co. v. McCord*, 233 U. S. 157, 163."

Moreover, it must be presumed that Congress had in mind the provisions of the then existing mining law. It

particularly referred to such mining laws and preserved to existing claims all their rights under such laws. The question of forfeiture for failure to do annual labor was not a new question for Congress. On March 2, 1907 it enacted an amendment to the mining laws applicable to Alaska. In that amendment it particularly provided that for failure to perform the annual labor *"such claims shall become forfeited."* (Act of March 2, 1907, 34 Stats. (p. 1243.) The mining laws applicable to the rest of the United States contained no such provision, but, on the contrary, provided that a failure to do assessment work should be without effect in the absence of relocation prior to the resumption of such annual work. Had this claim been in Alaska the procedure of the Secretary would have been perfectly proper, but, not being in Alaska, his procedure was unauthorized.

In this case there is no ambiguity which needs interpretation or construction. There is no ambiguity in the term *"valid claims."* There is no ambiguity in the words *"existent at date of the passage of this Act."* But it is claimed that there is an ambiguity in the words *"thereafter maintained in compliance with the laws under which initiated."* The ambiguity is alleged to occur in the word *"maintained."* But the word *"maintained"* is a common, ordinary word, the significance of which is well understood. This Court has passed upon the meaning of the word *"maintained"* in the case of *Wilbur v. Krushnic* 280 U. S. 306, and it there held that a claim was *"maintained"* within the meaning of the Leasing Act by a resumption of work after default therein, as well as by the performance of the work within the limited time. There thus being no ambiguity, the statute is not subject to the construction which petitioner seeks.

It is true, that following the statement that a claim is maintained within the meaning of the Leasing Act by a resumption of work, this Court said:

"Unless at least some form of challenge on behalf of the United States to the *valid existence* of the claim has intervened." (*Wilbur v. Krushnic*, Supra p. 318.)

It is clear that before the passage of the Leasing Act default in assessment work did not invalidate a claim otherwise valid, nor render it non-existent because invalid. On the contrary, the claim was still validly existent after default because resumption of work, as this Court observed in the *Krushnic* case, "*preserves* an *existing* estate." (P. 318.) The Court thus held that such resumption preserves an *existing* estate after the passage of the Act as well as before.

It therefore follows that if a claim had a valid existence when the Act was passed, it occupied the same status thereafter, even though a delinquency in assessment work occurred. The right to preserve the "*existing estate*" remained the same. No words are present in the Leasing Act which demand that this Court should hold, nor does any ambiguity appear in the Act which requires the Court to read into it, that failure to do assessment work renders a claim invalid or non-existent or a "*lost* estate." Otherwise resumption of work could not preserve an *existing* estate. Consequently there could be no basis for a challenge to the valid existence of a claim for such delinquency alone, and such challenge would be unwarranted. It therefore is not embraced within the expression used by this Court in the *Krushnic* case, "*unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened.*"

Mandatory Injunction is the Proper Remedy.

That the unwarranted action of the Secretary in rendering a decision that the claims of respondent are null and void, and his declaration that the United States had taken possession of the land for its own uses and purposes, constitute a cloud on respondent's title which it is entitled to

have removed, is well settled by decisions of this Court. As petitioner makes no point to the contrary, it is unnecessary to do more than cite a few of the cases sustaining this proposition.

Payne v. Central Pacific Railway Co., 255 U. S. 228.
Lane v. Watts, 234 U. S. 525, 540.
Noble v. Union River Logging Railroad, 147 U. S. 165.

CONCLUSION

V

It appears in this case that these claims were located in 1917. For 13 years thereafter annual assessment work on each of the six claims, of the value of not less than $100 per year, was performed. This expenditure by respondent amounted to $1,300 on each claim, or $7,800 for the entire group. It is true that in 1931 there was a lapse of some 60 days in the assessment work, and on the 64th day of such lapse the Department filed these proceedings. At the very time the proceedings were filed, arrangements had been made to do the assessment work, and the assessment work would have been done had the proceedings not been filed. The Department was over-eager to file this proceeding, and succeeded in having the contest filed before the work was actually resumed.

For the reason hereinbefore set out in this brief, it is submitted that the action of the Secretary in declaring a forfeiture of these claims was without authority, that such action has clouded the title of petitioner, and that the decree of the lower court, granting a mandatory injunction directing the Secretary to annul his proceedings, should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 23.—October Term, 1934.

Harold L. Ickes, as Secretary of the Interior, Petitioner, *vs.* Virginia-Colorado Development Corporation. } On Writ of Certiorari to the Court of Appeals of the District of Columbia.

[June 3, 1935.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The Virginia-Colorado Development Corporation brought this suit to obtain a mandatory injunction against the Secretary of the Interior requiring him to vacate certain adverse proceedings and his decision declaring certain placer claims of the plaintiff to be void. Motion to dismiss the bill of complaint was denied and, on defendant's refusal to plead further, plaintiff obtained a decree which the Court of Appeals affirmed. 69 F. (2d) 123. This Court granted a writ of certiorari (292 U. S. 620) in view of the question as to the construction of the Mineral Leasing Act, February 25, 1920, c. 85, 41 Stat. 437; 30 U. S. C. 181, 193.

The bill alleged that in June, 1917, under section 2324 of the Revised Statutes (30 U. S. C. 28), plaintiff located certain oil shale placer claims on mineral lands of the United States in Colorado and thereupon became the owner of the claims and entitled to their exclusive possession; that from that time until, and including, the year ending July 1, 1930, the annual assessment work required by the statute was performed on each of the claims; that during the year ending July 1, 1931, the assessment work was not performed and had not been resumed before September 4, 1931, or since, but that plaintiff then intended to resume work, and had made arrangements for that resumption which would have been had but for the action of defendant; that plaintiff had not abandoned, or intended to abandon, any of the claims and that no charge to that effect had been made; that about September 4, 1931, adverse proceedings were initiated by the Department of the Interior, through the General Land Office, with the filing of a "challenge" to plaintiff's

title and right of possession and by "posting such challenge on the said claims"; that the challenge was based on the sole ground that plaintiff had not performed the annual assessment work and that "the United States resumed possession of said land".

Plaintiff further alleged that there had been "no relocation of any of the claims by any person since plaintiff's failure to perform the annual assessment work, and that there had been no application by anyone to lease any of the claims from the United States". Plainfiff recited the answer he had made to the challenge, in substance, that notwithstanding his failure to perform the described work, he had the right to retain possession of the claims and to resume work thereon "at any time prior to a valid subsequent location of said claims"; but that the Commissioner of the General Land Office had held that the claims were null and void, and his ruling had been affirmed by the Secretary of the Interior whose decision had been promulgated declaring that the United States had taken possession for its own purposes, thus in effect decreeing a forfeiture.

Plaintiff then set forth the provisions of the Mineral Leasing Act of February 25, 1920, which authorized the Secretary of the Interior to execute leases of mineral lands, but contained an exception as to valid claims existing on the date of the passage of the Act "and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery".[1]

1. The character and extent of the right which plaintiff acquired by virtue of its location of the mining claims, in 1917, are well established. Restating the rule declared by many decisions, we said in *Wilbur* v. *Krushnic*, 280 U. S. 306, 316, that such a location, perfected under the law, "has the effect of a grant by the

[1]Section 37 of the Act of February 25, 1920, c. 85, 41 Stat. 437, 451 (30 U. S. C. 193) is as follows:

"Sec. 37. That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits described in the joint resolution entitled 'Joint resolution authorizing the Secretary of the Interior to permit the continuation of coal mining operations on certain lands in Wyoming', approved August 1, 1912 (Thirty-seventh Statutes at Large, p. 1346), shall be subject to disposition only in the form and manner provided in this Act, except as to valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery".

United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term". It is alienable, inheritable, and taxable. See *Forbes* v. *Gracey*, 94 U. S. 762, 767; *Belk* v. *Meagher*, 104 U. S. 279, 283; *Manuel* v. *Wulff*, 152 U. S. 505, 510, 511; *Elder* v. *Wood*, 208 U. S. 226, 232; *Bradford* v. *Morrison*, 212 U. S. 389, 394. Under Section 2324 of the Revised Statutes (30 U. S. C. 28), the owner is required to perform labor of the value of $100 annually, but a failure to do so does not *ipso facto* forfeit his claim, but only renders it subject to loss by relocation. The law is clear "that no relocation can be made if work be resumed after default and before such relocation". Thus, prior to the passage of the Leasing Act of 1920, the annual performance of labor "was not necessary to preserve the possessory right, with all the incidents of ownership above stated, as against the United States, but only as against subsequent relocators. So far as the government was concerned, failure to do assessment work for any year was without effect. Whenever $500 worth of labor in the aggregate had been performed, other requirements aside, the owner became entitled to a patent, even though in some years annual assessment labor had been omitted". *Wilbur* v. *Krushnic, supra.*

There was authority in the Secretary of the Interior, by appropriate proceedings, to determine that a claim was invalid for lack of discovery, fraud, or other defect, or that it was subject to cancellation by reason of abandonment. *Cameron* v. *United States*, 252 U. S. 450, 460; *Cole* v. *Ralph*, 252 U. S. 286, 296; *Black* v. *Elkhorn Mining Co.*, 163 U. S. 445, 450; *Brown* v. *Gurney*, 201 U. S. 184, 192, 193; *Farrell* v. *Lockhart*, 210 U. S. 142, 147.

2. The Leasing Act of 1920 inaugurated a new policy. Instead of the acquisition of rights by location, the Act provided for leases. But by express provision, the Act saved existing valid claims "thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws". (Sec. 37[2].) What then was the status of plaintiff's claims under this exception? They were originally valid claims. No question is raised to the contrary. There is no suggestion of lack of discovery, fraud or other defect. There is no ground for a charge of abandonment. The allegations of the bill, admitted by the motion

[2] See Note 1.

to dismiss, dispose of any such contention. Plaintiff had lost no rights by failure to do the annual assessment work; that failure gave the government no ground of forfeiture. *Wilbur* v. *Krushnic, supra.*

How could the valid claims of plaintiff be "thereafter maintained in compliance with the laws under which initiated"? Manifestly, by a resumption of work. Plaintiff was entitled to resume, and the bill alleged that plaintiff had made arrangements for resumption, and that work would have been resumed if the Department of the Interior had not intervened. Plaintiff's rights after resumption would have been as if "no default had occurred". *Belk* v. *Meagher, supra.* Such a resumption would have been an act "not in derogation but in affirmance of the original location," and thereby the claim would have been "maintained". As we said in *Wilbur* v. *Krushnic, supra,* p. 318, "Such resumption does not *restore* a *lost* estate .. . .; it *preserves* an *existing* estate".

In this view, plaintiff came directly within the exception. The Government invokes the new policy of the Leasing Act abolishing the practice of location. But the saving provision of section 37 is a part of the policy of the Act. Its terms explicitly declare the will of Congress as to valid existing claims, with full understanding of the status of such claims under the prior law.

The Government refers to the reservation in the opinion in *Wilbur* v. *Krushnic, supra,* as to the maintenance of a claim by a resumption of work "unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened". But that was a reservation, not a decision, and it does not aid the Government in its contention here. To be effective, the "challenge" to the "valid existence" of a claim must have some proper basis. No such basis is shown.

We think that the Department's challenge, its adverse proceedings, and the decision set forth in the bill went beyond the authority conferred by law. The decree is affirmed.

Decree affirmed.